

A ‘PICK AND MIX’ APPROACH TO COLLECTIVE REDUNDANCY

Abstract

The recent litigation on collective redundancy rights¹ raised a number of important issues, all of which centred on whether the national practices in the UK and in Spain were compliant with the relevant EU legislation. The importance of ensuring that the collective redundancy regime operates appropriately has once again reared its head following the collapse of BHS and Austin Reed, and may do again following a vote for Brexit. Inevitably the Court of Justice of the European Union played a pivotal role in interpreting the scope of the legislation, with three distinct and separate challenges to the respective national application of the collective redundancy rights in *USDAW*², *Lyttle*³ and *Cañas*⁴. This paper will give consideration to the issues raised across these three cases. To this end the primary focus of this paper is on the interpretation of the term ‘establishment’, which is central to the working of the Collective Redundancies Directive. This paper identifies the approach adopted by the CJEU in interpreting this concept, before questioning whether an alternative approach may have been more desirable. The second part of this paper considers questions concerning vertical direct effect of the Directive, and horizontal direct effect of rights that are contained within the Charter of Fundamental Rights.⁵ Whilst this paper will be led by the UK position and the decision of the European Court in the *USDAW* litigation, reference will also be made to the decisions in *Lyttle* and *Cañas* where appropriate, given the close nexus between these cases.

I. COLLECTIVE RIGHTS IN CONTEXT

Over the previous six years there have been significant casualties as a consequence of the economic crisis, including Comet in November 2012, which resulted in the closure of 236 stores with a loss of some 6,895 workers, Blockbuster in November 2013, with 264 stores closed and 2,000 workers made redundant, and Phones4U in September 2014, which closed 720 outlets with around 5,600 redundancies being made. Of more recent times there has been the collapse of both BHS, which had been part of the British High Street since 1928, and Austin Reed which had been operating since 1900, both of which entered administration during summer 2016. The demise of BHS will see the closure of 164 stores, with a loss of up

¹ In particular *United States v Nolan* [2014] EWCA Civ 71, *USDAW v Ethel Austin Ltd (in administration) and another case* [2012], UKEAT/0547/12/KN and UKEAT/0548/12/KN, *Lyttle and ors v Bluebird UK Bidco 2 Ltd* [2013] NIIT 00555_12IT and *Akbar and ors v. Comet Group Ltd (in Creditors Voluntary Liquidation) and Secretary of State for Business Innovation and Skills* [2014], Case no: 1102571/2012.

² *Union of Shop, Distributive and Allied Workers (USDAW), Wilson v. WW Realisation 1 Ltd, in liquidation, Ethel Austin Ltd, Secretary of State for Business, Innovation and Skills*, Case 80/14, ECLI:EU:C:2015:291.

³ *Valerie Lyttle and Others v. Bluebird UK Bidco 2 Limited*, Case C-182/13, ECLI:EU:C:2015:317.

⁴ *Andrés Rabal Cañas v. Nexea Gestión Documental SA and Fondo de Garantía Salarial*, Case C-392/13, ECLI:EU:C:2015:318.

⁵ Although this paper seeks to raise the importance of general principles it is beyond it to develop this discussion further.

to 11,000 jobs, whilst the Austin Reed brand will see around 120 stores close with a loss of some 1,000 jobs. The number of redundancies involved is not insignificant in any of these situations, and one would think that given that each situation involves multiple redundancies that the collective redundancies regime would apply. Furthermore, there is nervousness in the market at present following the result of the UK referendum of 23 June 2016, and whether Brexit will result in redundancies due to relocation of businesses. However, whether and which workers are or will be afforded collective consultation remains narrow, with, arguably, many of these workers currently falling outside of the remit of the relevant protections.

It is in light of the collapse of leading household names during the recession that the rights afforded upon collective redundancy were widely scrutinised in the media. This scrutiny intensified on the collapse of Woolworths, a store that had been part of the nationwide retail landscape across the UK for generations. The litigation that followed from such liquidations led to the questioning of whether the UK's approach was in compliance with the EU's parent Collective Redundancy Directive⁶ (the 'CRD'). This was particularly evident in the *USDAW* litigation surrounding the collapse of Ethel Austin and Woolworths. Here it was examined whether the legal protection was constructed too narrowly so as to exclude some workers from the consultation process and was thus in breach of European obligations, and if that was the case, whether there were legal tools or principles that could operate to ensure wider protection under the relevant legislation so as to 'fix' the protections. Similar questions were asked in both *Lyttle* - in relation to the Northern Ireland approach to collective redundancy- and in *Cañas* - in relation to the Spanish approach. Although this line of case law has now concluded⁷, this paper will focus on the submissions raised during the recent cases of

⁶ This was initially introduced through Directive 75/129/EEC, which was amended by directive 92/56/EEC and consolidated in Directive 98/59/EC.

⁷ The decision of the European Court was handed down on 30 April 2015.

*USDAW*⁸, *Lyttle*⁹ and *Cañas*¹⁰, with a view to questioning whether the evident restrictive approach adopted by the Court of Justice of the European Union ('CJEU') was the correct approach, or whether a more inclusive approach was possible, which would have better achieved the principle aims of the Directive and thus would have provided a stronger social right going forward.

Interestingly, especially considering the restricted approach alluded to above and further detailed below, if one places the CRD in its historical context it becomes evident that it was developed during a period where there was a growing trend towards enhancing the consultation of workers at EU level in a number of specific contexts¹¹, which included the European Works Council Directive and the European Company Statute, and according to Barnard was an issue that had formed part of the European Commission's agenda since the early 1970's.¹² This move toward a more complete system of employee consultation is evidenced by Hall, on discussing the implementation of the EU Information and Consultation Directive through the Information and Consultation of Employees Regulations, when he expressed that they '...represent a significant extension of the range of issues on which employees have statutory rights to be informed and consulted, introducing a comprehensive legal framework for information and consultation for the first time...'¹³. Referencing these regulations as an extension of consultation rights, would imply a suitable level of worker consultation existed in the specific contexts that had already existed, including collective

⁸ *Union of Shop, Distributive and Allied Workers (USDAW), Wilson v. WW Realisation 1 Ltd, in liquidation, Ethel Austin Ltd, Secretary of State for Business, Innovation and Skills*, Case 80/14, ECLI:EU:C:2015:291.

⁹ *Valerie Lyttle and Others v. Bluebird UK Bidco 2 Limited*, Case C-182/13, ECLI:EU:C:2015:317.

¹⁰ *Andrés Rabal Cañas v. Nexea Gestión Documental SA and Fondo de Garantía Salarial*, Case C-392/13, ECLI:EU:C:2015:318.

¹¹ For a useful account of the growing trend towards worker consultation see: Hall, *Assessing the Information and Consultation of Employees Regulations*, (2005), *Industrial Law Journal*, 103-126, at pp.104-110; Catherine Barnard, *EC Employment Law* (3rd ed, OUP, 2006), discussed at chapter 15, and Weiss, *Workers' Participation in the European Union*, chapter 10 in Davies et al *European Community Labour Law, principles and perspectives*, 1996, Oxford University Press.

¹² Barnard, at page ??

¹³ Hall, p.125.

redundancies, but also highlights the ongoing commitment to consultation of workers at EU level.¹⁴ Further support for the continuing desire on the part of the EU to ensure adequate employee consultation rights comes from Doherty, where he considers that '[s]uch a view is explicit in Title III of the Charter of Fundamental Rights, which specifically protects workers' rights to information and consultation within the undertaking and Articles 137-139 EC, which promote "social dialogue." It is against this background that the current approach to consultation rights under the CRD, following the CJEU decisions in *USDAW*, *Lyttle* and *Cañas*, arguably does not sit comfortably.

The consultation rights that workers have when they are subject to collective redundancies are derived from the CRD. The significance of the protection can be read at Recital 2, which states "that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community."

Article 1 of CRD provided Member States with two options when transposing the protection, leaving each state with the choice on how they were going to define a collective redundancy, being:

(i) either, over a period of 30 days:

at least 10 in establishments normally employing more than 20 and less than 100 workers,

at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

at least 30 in establishments normally employing 300 workers or more,

¹⁴ Doherty, 'It's good to talk... isn't it? Legislating for information and consultation in the Irish workplace' D.U.L.J. 2008, 30, 120-137.

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question

It is only Option 1 that makes a link between the numeric of the redundancies to the overall number of workers within an establishment. Under both Options it is evident that understanding the term establishment is important.¹⁵ In addition to this, if a worker is employed in a Member State where Option 1 has been transposed¹⁶ there is a need to know two pieces of information before one can conclude whether there is a right to information and consultation under CRD: (1) how many workers are being made redundant? and; (2) how many workers are employed at that establishment? The answer to each of these questions is crucial. Conversely, Option 2¹⁷ only has one additional piece of information that needs to be determined to activate the right, namely, how many workers are being made redundant?¹⁸ Option 2 incorporates no link to the overall size of the workforce.

In terms of the right itself, Article 2(1) states that “[w]here an employer is *contemplating* collective redundancies, he shall begin consultations with the workers’ representatives in good time with a view to reaching an agreement”. It is thus explicit in the Directive that the consultation right activates at a point in time when the employer is contemplating collective redundancies, rather than when the decision has been made. This suggests that the underlying rationale of the Directive is to inform and consult with the affected workforce with a view to avoiding, or at the very least reducing, the need for

¹⁵ There was a submission made in the *USDAW* case on the point that determining the meaning of ‘establishment’ does not appear important, as the English, French, Italian and Spanish version CRD, utilises the plural ‘establishments’, and so *prima facie* has an expanded scope; however, this argument is not being taken forward. This was expressed as irrelevant by A-G Wahl (see para. 53), and the CJEU. The CJEU identified that there was no distinction between EU MSs that transposed Option 1 or Option 2 and their choice of the singular or plural. Further, despite the UK and Spain adopting different transposition models they both elected to use the plural ‘establishments’. This is particularly highlighted at para.55 of the *USDAW* decision. This appears to be a matter of inconsistent choice of terminology across MSs rather than a specific choice for the purpose of expanding the concept.,

¹⁶ This includes Denmark, Greece, Belgium and Romania.

¹⁷ This includes the UK and Croatia.

¹⁸ The threshold number of redundancies is considered over a reference period of at least 90 days.

redundancies, rather than undergoing consultation when the decision has already been reached.¹⁹ This is certainly logical since Article 2(2), which provides substance to the information and consultation right, states that “[t]hese consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences...”

The primary aim of the right is therefore evidently to reduce as close to zero the number of redundancies that are required. Such an aim can only be satisfied if the consultation takes place before any decision is made²⁰; it is a right to pre-redundancy decision consultation.

II. THE UK APPROACH TO COLLECTIVE REDUNDANCIES

The UK transposed the EU’s CRD through the Trade Union and Labour Relations (Consolidation) Act 1992 (‘TULRCA’)²¹:

188. Duty of employer to consult ... representatives

¹⁹ The trigger point was raised in *Nolan*; however, due to the specific circumstances of the case the situation fell within the derogation contained at Article 1(2)(b) CRD, covering ‘workers employed by public administrative bodies or by establishments governed by public law’, and thus the CJEU proffered no guidance on this matter (see Judgment in *Nolan*, C-583/10, ECLI:EU:C:2012:638; this approach was followed when the case returned to the CA). The trigger point question, although not addressed by either the EAT or the CA in the *Woolworths* litigation, could be crucial to the vertical direct effect argument that has been raised.

²⁰ Although there may be exceptional circumstances where the undertaking in question has the decision imposed upon them by an over-arching decision maker and at short notice which makes it impossible to undertake the necessary consultation in advance of a decision, as alluded to by A-G Mengozzi: Advocate General Opinion in *Nolan*, C-583/10, ECLI:EU:C:2012:160.

²¹ A similar approach is evident in Northern Ireland, where the CRD was transposed through Part XIII of the Employment Rights (Northern Ireland) Order 1996 and by Part IV, Chapter II of the Trade Union and Labour Relations (Consolidation) Act 1992. The approach in the Spanish system is very different, as this, on the face of it, appears to be an Option 1 transposition, although it was described as a hybrid of the two in the Opinion of A-G Wahl at paragraph 66. The Spanish transposition of the CRD was through Article 51(1) of the *Ley del Estatuto de los Trabajadores* (Law on the Workers’ Statute). This is not being replicated here as it does not add anything to the discussion other than by acknowledging that the Spanish legislation used the term ‘undertaking’.

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

(1A) The consultation shall begin in good time and in any event –

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days²², and

(b) otherwise, at least 30 days,

the first of the dismissals takes effect.

In line with the Directive, s.188 TULRCA does not link the number of redundancies to the overall number of the workforce, and so one would think that this would not cause a problem to cases that come before the UK domestic courts; however, it is apparent on the face of s.188 that the UK position may have at least three inconsistencies with that required by the CRD:

- (i) it restricts the right to the concept of ‘employee’, whereas the Directive uses the more expansive term ‘worker’;
- (ii) it expresses the right as arising at a point in time when there are dismissals proposed, rather than in mere contemplation; and

²²²² The period of consultation for affected workers was reduced on the 6 April 2013 by the current government to 45 days: The Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (SI 2013/763).

- (iii) Consideration of the number of workers is restricted to those employed at ‘one establishment’ rather than the more expansive approach of establishments.

In order to give effect to the right, s.189 TULRCA provides a remedy in the form of a protective award for non-compliance with the consultation rights, with compensation being awarded for any such failure. To give further substance to the right, by virtue of s.184(2)(d) of the Employment Rights Act 1996, if the employer who is liable under a protective award is insolvent it will be a debt that is guaranteed by the Secretary of State.

However, the focus of this paper is on the battleground that was a common consideration in the *USDAW*²³ litigation, *Lyttle and ors v Bluebird UK Bidco 2 Ltd*²⁴ and in *Cañas*²⁵: with whom must an employer consult when making collective redundancies? Thus, the focus is solely on the third of these three potential inconsistencies.

III. A RETAIL REDUNDANCY STORY: WOOLWORTHS, ETHEL AUSTIN AND BON MARCHE

The issue of the ‘affected employee’ for consultation rights was central to the litigation surrounding the demise of both Woolworths and Ethel Austin in the UK courts²⁶, the proceedings before the Northern Ireland Tribunal in *Lyttle* concerning the closure of Bon Marche stores, and redundancies that took place in the company Nexea, which formed part of the Correos commercial group in *Cañas*. Of paramount importance in each of these cases was a determination of whether the number of redundancies was to be read over a single employment unit or all units that make up the relevant business. The importance of this

²³ See *USDAW* (n 1).

²⁴ See *Lyttle* (n 1).

²⁵ See *Cañas* (n 5).

²⁶ This paper will only be considering the employment tribunal actions; however, it is worth noting that alongside the employment law actions there were also criminal law actions

determination can be best seen through the factual circumstances of the closure of Woolworths and Ethel Austin stores.²⁷

Ethel Austin entered administration on the 8 March 2010, impacting upon the employment position of some 1,700 members of staff. When Woolworths ceased trading on 3 January 2009 there were over 27,000 employees that were to be made redundant. However, before each of the respective Employment Tribunals²⁸ it was held that s.188 TULRCA operated on a singular unit basis, meaning that although USDAW had successfully argued for protective awards for some members of staff due to consultation failures, those employed at a shop or store where less than 20²⁹ were being made redundant saw their claim fail. This resulted in 1210 out of 1,700 staff of Ethel Austin and 3,233 of Woolworth's employees not being awarded a protective award.

The decisions in *USDAW* were appealed to the EAT, and again to the Court of Appeal on the following grounds: did the ET fail in construing s.188 in a manner that would give effect to the protections founded under the CRD (that is did the duty to consult arise when there was a total of 20 employees being made redundant across the relevant business as a whole or did it only arise at a singular establishment when at least 20 were made redundant at that site)? In the alternative, could the right to information and consultation be derived through the European principle of direct effect?

²⁷ Although the facts of any number of closures could have been selected to highlight the problem, such as the closure of Comet stores or the Barratt's administration, all of which impacted upon vast numbers of workers, which were spread across different sized employment units. A more recent example is the current ongoing situation surrounding the administration of Phones 4 U.

²⁸ The Ethel Austin was first heard by the Liverpool Employment Tribunal on 20 November 2011 under the chairmanship of Employment Judge Robinson, whereas the Woolworths case was first heard by the London Central Employment Tribunal on 19 January 2012, presided over by Employment Judge Dr Simon Auerbach.

²⁹ The same situation existed following the collapse of the Comet group in 2012. Following a failure to consult with the staff that Comet were making redundant, Employment Judge Forrest in the Leeds Employment Tribunal ordered, by Order of 11 June 2014, that there was a failure to comply with s.188 TULRCA, and that consequently protective awards were to be made. However, similar to the situation with Woolworths and Ethel Austin, some of the employing stores employed less than 20 workers, and so the decision in *USDAW*, became important in this context as it had a direct impact on those employees that were made redundant from a Comet store that employed less than 20 employees.

Similar issues were also present in the *Lyttle* case, in which the Northern Ireland Tribunal referred³⁰ the following questions to the CJEU, with the hope of being provided with some clarity on the matter:

1. In the context of Article 1.1(a)(ii) of the 1998 Directive, does ‘establishment’ have the same meaning as it has in the context of Article 1.1(a)(i)?
2. If not, can ‘an establishment’, for the purposes of Article 1.1(a)(ii), be constituted by an organisational sub-unit of an undertaking which consists of or includes more than one local employment unit?
3. In Article 1.1(a)(ii) of the Directive, does the phrase ‘at least 20’ refer to the number of dismissals across all of the employer’s establishments, or does it instead refer to the number of dismissals per establishment? (In other words, is the reference to 20 a reference to 20 in any particular establishment, or to 20 overall?)

The Court of Appeal in *USDAW*³¹ referred the matter to the CJEU³². Whereas the *Lyttle* litigation focuses solely on the concept of ‘establishment’, the *USDAW* litigation introduces additional interesting questions concerning direct effect. Alongside considering other issues, including whether the expiration of a fixed-term contract contributed to the redundancy calculation, the central focus in *Cañas* was on the proper construction of the term ‘establishment’, and thus each of the three decisions, although not formally joined, were considered alongside one another given their clear overlap. This paper now turns to consider the issue that was present in all three of the cases, the concept of ‘establishment’, before turning to consider the matter of direct effect, as raised in the *USDAW* litigation.

³⁰ The reference was lodged by the Northern Ireland Tribunal on 12 April 2013.

³¹ *USDAW & Anor v Ethel Austin Ltd & Ors* [2014] EWCA Civ 142.

³² The reference was lodged on 14 February 2014.

IV. DEFINING ‘ESTABLISHMENT’

It is clear that the UK satisfied its CRD obligations by adopting an option 2 model³³ under Article 1³⁴. The EAT in *USDAW* expressed the view that there was nothing in the implementation discourse prior to s.188 TULCRA being introduced to suggest that the right would be restricted to circumstances where there were 20 or more dismissals at a ‘single establishment’.³⁵ Instead the focus was to be solely on the total number of dismissals across the undertaking.³⁶ This contrasted with the ET’s view and subsequent application of the protection, with the respective ET’s in *USDAW* being in agreement that s.188 TULCRA’s use of ‘singular establishment’ rather than the plural narrowed the consideration of the workplace so as to look at individual employment units. It was this narrowing down of the scope of the protection that caused problems and called into question the UK’s compliance with the CRD³⁷.

The EAT indicated that the ET’s approach excluded a “very substantial number of employees from the right”³⁸, and that there “should be some interpretation to yield the outcome that the obligation arises when 20 or more are to be dismissed irrespective of where they work”³⁹; the appellate court considered the ET approach to be too narrow.⁴⁰ In response the EAT considered that this restriction could be removed, and EU compliance ensured, if the

³³ This was also the approach in Northern Ireland. The Spanish approach did differ.

³⁴ The EAT supported this conclusion by giving consideration to the pertinent Parliamentary debates that took place at the time that s.188 was implemented, in particular the views of the then Government spokesman Lord Chesham. This was further accepted by the CJEU at para 44.

³⁵ See *USDAW* (n 1), para 24 *et seq.*

³⁶ It was noted that there were similar views expressed in relation to the explanatory notes which accompanied the transposing regulations.

³⁷ Although non-compliance will depend on whether the CJEU considers the narrow approach applied in the ET as too restricted.

³⁸ Such a view is supported by the CJEU, para 61: although this is worded from the point of view that aggregating dismissals across all establishments of an undertaking would ‘significantly increase the number of workers eligible for protection’, the sentiment is the same.

³⁹ See *USDAW* (n 1), para 35.

⁴⁰ See *USDAW* (n 1), para 29.

meaning of ‘one establishment’ could be interpreted⁴¹ to cover the entire undertaking of the employer.⁴² The EAT further considered submissions on direct effect as an alternative means of providing affected employees with the correct redress.⁴³

The debate between the narrow and restricted approach to establishment adopted by the ET and the broader and more inclusive approach favoured by the EAT reached its ultimate conclusion when the CJEU held that “Article 1(1)(a)(ii) of Directive 98/59 must be interpreted as not precluding national legislation that lays down an obligation to inform and consult workers in the event of the dismissal, within a period of 90 days, of at least 20 workers from a particular establishment of an undertaking, and not where the aggregate number of dismissals across all of the establishments or across some of the establishments of an undertaking over the same period reaches or exceeds the threshold of 20 workers”.⁴⁴ In other words the decision of the CJEU supported a narrow interpretation of the concept, with a focus on singular establishments rather than an aggregated approach.

Despite these very different conclusions across the different levels of the UK courts there was one thing in common: each reached their respective decisions after giving consideration to European Court of Justice (‘the ECJ’, as it then was) jurisprudence in this area; however, despite collective redundancy consultation rights having existed at European level since 1975 there is little guidance on the concept of establishment, and no guidance

⁴¹ This option is available for national provisions transposing EU instruments through the principle of indirect effect: see Judgment in *Marleasing*, C-106/89, ECLI:EU:C:1990:395. If so required a court may even add or remove words in order to ensure a compliant interpretation can be found: judgment in *Coleman*, C-303/06, ECLI:EU:C:2008:415.

⁴² An alternative submission put forward by USDAW was to delete the words “at one establishment”. Interestingly, the EAT proffered a further option of requiring consultation being triggered across the relevant business so long as at least one establishment were making 20 or more establishments; however, this does not appear to solve the problem: see M Butler, ‘The recent decision of *USDAW v Ethel Austin Ltd*: collective redundancy, to consult or not to consult? (Case Comment)’, *Insolvency Intelligence* [2013], 9-12.

⁴³ There is almost a hierarchy in terms of the order of the tools to be used when there is a potential conflict between national law and EU law, with the application of interpretative methods generally considered to be the first available tool. See Advocate General Bot’s Opinion in *Kücükdeveci*, C-555/07, ECLI:EU:C:2009:429, paras 59-60.

⁴⁴ USDAW (n.1), para 71.

when dealing within the context of Option 2 Member States. The extent of the European jurisprudence is the Option 1 cases of *Rockfon*⁴⁵ and *Athinaiki*⁴⁶, which, although of questionable relevance, were taken to offer some guidance as to how the concept should be defined in Option 2 States, including the UK.

A. Rockfon and Athinaiki: the factual matrix

Rockfon formed part of the multinational group Rockwool International, which employed some 5,300 workers in total, 1,435 of which were based in Denmark. Of those 1,435, 1,085 worked in Hedenhusene. There were four companies from the Rockwool International Group based in Hedenhusene, one of which was Rockfon. For efficiency purposes Rockfon and the three other companies shared a personnel department, which was part of Rockwell A/S, one of the other companies located in the Hedenhusene area. All decisions on dismissals and redundancies by any one of the four companies within the group had to be taken in consultation with that personnel department.

In 1989, Rockfon, which had a total of 162 employees, dismissed 24/25 workers due to shortage of work; however, it did not comply with rules on notification or the consultation procedure protected under Danish national law pursuant to Directive 75/129/EEC⁴⁷. The Danish Labour Council held that Rockfon formed part of a larger undertaking, the Rockwell group, which employed more than 300 workers. As a result Rockfon were found not to have infringed the law, since the Danish law giving effect to the Directive only required consultation to be undertaken where at least 30 workers were affected over a period of 30 days in companies employing more than 300. This decision was upheld by the Board of

⁴⁵ Judgment in *Rockfon*, C-449/93, ECLI:EU:C:1995:420. For a useful case analysis see Craig, "'Establishment" and Redundancy Consultation' Employment Law Bulletin [1996], 9-12.

⁴⁶ Judgment in *Athinaiki*, C-270/05, ECLI:EU:C:2007:101.

⁴⁷ This is the earlier version of the CRD.

Employment on appeal, before it was overturned before the Byret District Court, which made a finding that Rockfon was itself an ‘establishment’ since it retained the powers of dismissal, with the joint personnel department merely having a consultative role. As such Rockfon ought to have notified the workers of the redundancies⁴⁸, and as a result of failing to do so was then required to pay compensation.

When the issue was heard on appeal by the Østre Landsret, the court referred the following question to the ECJ for a preliminary ruling:

Is article 1 of Council Directive (75/129/E.E.C.) of 17 February 1975 on the approximation of the laws of the member states relating to collective redundancies to be interpreted as meaning that it precludes two or more interrelated undertakings in a group, neither or none of which has decisive influence over the other or others, from establishing a joint recruitment and dismissal department so that, for example, dismissals in one of the companies can only be effected with the approval of that department and so that the total number of employees in the companies is accordingly to be taken into account in determining the number of employees under article 1(1) of that Directive?

The question to be determined by the ECJ was thus whether the term ‘establishment’, which was not defined in the Directive⁴⁹, was to be interpreted to mean all the undertakings using the personnel department together as a group, or each undertaking taken separately.

⁴⁸ Bearing in mind that Option 1 States required consultation where at least 10% of the workforce was being made redundant for establishments employing 100-300 workers.

⁴⁹ The ECJ also makes it clear that ‘establishment’ is a Community term and thus cannot be defined by reference to the laws of the Member States, see Judgment in *Rockfon*, ECLI:EU:C:1995:420, paras 23 and 25. Thus according to the ECJ ‘[establishment] must, accordingly, be interpreted in an autonomous and uniform manner in the Community legal order’. As such simply using different terminology, for example labelling something as an operating unit will not preclude that part of the business from falling within the concept of ‘establishment’. See judgment in *Athinaiki*, ECLI:EU:C:2007:101, paras 23 and 30.

This can be compared to the position in *Athinaiki*, which involved a Greek company that consisted of three separate units that were located in three different locations: a unit for the manufacture of writing paper, printing paper, mechanical pulp, chip-board and aluminium sulphate with a staff of 420 people; a second unit for the manufacture of soft kitchen paper, toilet paper, bags and so forth, and; a third unit for the processing of soft paper. Each unit was a distinct unit, utilising their own specialist equipment and workforce and employing their own chief production office responsible for overseeing that unit's production; however, similar to the position in *Rockfon*, some companywide decisions, such as purchasing of materials and costing of products, were made centrally based on the information provided by each individual unit. Additionally, there was also a central joint accounts office, which was responsible for financial matters such as invoicing and the payment of wages.

By a decision of the 18 July 2002 the first unit was closed down, resulting in almost all of the workers attached to it being dismissed by reason of redundancy. Workers' representatives entered into statutory consultation following invitation by letter on 22 July 2002, and the competent Labour Inspectorate was notified, as required under Greek law. During consultation the workers' representatives were only provided with the financial information of the affected unit, and not the company's general company information. Despite there being an extension to the consultation period due to no agreement being reached, the company did not attend further negotiations, and instead proceeded to make redundancies.

Following an appeal by the company against the workers' success in arguing a breach of the consultation requirements to the Efetio Thrakis (Thrace Court of Appeal), the following question was referred to the ECJ:

Do the foregoing facts found by the Efetio Thrakis fall within the meaning of the Community term "establishment", for the purpose of applying the Council directives referred to in the grounds of this decision and Law?

In other words, does a unit such as that in question, where much of its operations are distinct but with certain fundamental aspects of it not being independent from the company as a whole, fall within the concept of 'establishment' for the purposes of the CRD? In essence the same question was asked in *Athinaiki* as was in *Rockfon*, with a determination of the concept of establishment under the CRD being required.

B. Rockfon and Athinaiki: a flexible approach to the concept of "establishment"?

Firstly, both Advocate-General (hereinafter 'A-G') Cosmos⁵⁰ and the ECJ⁵¹ in *Rockfon* made it clear that the Directive does not impact upon the arrangements put in place by interrelated undertakings in a group to deal with recruitment or dismissal; however, with the caveat that such arrangements must not act in a manner which circumvents the Directive's protections.⁵² Therefore there is no obligation to ensure that individual units retain powers, such as in recruitment or dismissal, in order to be considered an 'establishment' for the purposes of the CRD.

On the issue of interpreting the term 'establishment' both the Court⁵³ and A-G Cosmos⁵⁴ in *Rockfon* adopted the view that "different language versions of a Community text must be given a uniform interpretation and in the case of divergence between the versions the

⁵⁰ Advocate General Cosmos's Opinion in *Rockfon*, C-449/93, ECLI:EU:C:1995:242, para 22.

⁵¹ Judgment in *Rockfon*, ECLI:EU:C:1995:420, para 22.

⁵² Judgment in *Rockfon*, ECLI:EU:C:1995:420, paragraph 30, and Advocate General Cosmos's Opinion in *Rockfon*, ECLI:EU:C:1995:242, para 22.

⁵³ Reference was made to the judgment in *Bouchereau*, Case 30-77, ECLI:EU:C:1977:172.

⁵⁴ Reference was made to the Cricket St Thomas case.

provision in question must ... be interpreted by reference to the purpose and general scheme of the rules of which it forms part”⁵⁵, the purpose being identified as twofold: (i) to regulate and harmonise this area and (ii) to promote improved working conditions and an improved standard of living for workers.⁵⁶ A-G Cosmos also identified a further underlying principle, the protection of workers in the event of collective redundancies, which was also to be taken into consideration when interpreting the term ‘establishment’.⁵⁷ Consequently, it is against the backdrop of providing partial harmonization of collective redundancy procedures whilst not restricting “the freedom of undertakings to organize their activities and arrange their personnel departments in the way which they think best suits their needs”⁵⁸, that the interpretation of ‘establishment’ was to be made.⁵⁹

A-G Cosmos referred to the *travaux préparatoires*, stating that the original proposal of the Directive used the term undertaking and that, in the last subparagraph of Article 1(1) of the proposal, this was defined as a ‘local employment unit’.⁶⁰ This was later replaced with the term ‘establishment’, with the supporting definition being removed as it was now considered unnecessary. A-G Cosmos concludes by suggesting that should the Community legislature have wanted the term to apply to the broad establishment then more appropriate terminology would have been adopted.⁶¹ Further support for this conclusion came from the Acquired

⁵⁵ Judgment in *Rockfon*, ECLI:EU:C:1995:420, para 28; similarly see Advocate General Cosmos’s Opinion in *Rockfon*, ECLI:EU:C:1995:242, para 36.

⁵⁶ This purpose was identified due to the dual legal bases of Article 100 and 117 EC being utilised. In support of these purposes AG Cosmos focussed on the Council Resolution of 21 January 1974: see Advocate General Cosmos’s Opinion in *Rockfon*, ECLI:EU:C:1995:242, paragraph 41, this is followed by the ECJ, see Judgment in *Rockfon*, ECLI:EU:C:1995:420, para 29.

⁵⁷ Advocate General Cosmos’s Opinion in *Rockfon*, ECLI:EU:C:1995:242, para 38.

⁵⁸ Advocate General Cosmos’s Opinion in *Rockfon*, ECLI:EU:C:1995:242, para 43: ‘effective protection for workers by approximating the laws of the Member States relating to collective redundancies’.

⁵⁹ Judgment in *Rockfon*, ECLI:EU:C:1995:420, para 21.

⁶⁰ ‘*unité locale d’emploi*’, ‘*örtliche Beschäftigungseinheit*’: Advocate General Cosmos’s Opinion in *Rockfon*, ECLI:EU:C:1995:242, para 44, this is also supported by the ECJ, see Judgment in *Rockfon*, ECLI:EU:C:1995:420, para 33.

⁶¹ Although this is not explicit in the ECJ judgment it is certainly implicit. This is returned to later as a point of potential reform, should the EU wish to redress the incomparability of protection that the current approach introduces.

Rights Directive case of *Botzen*⁶², where the ECJ held that “an employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties”.⁶³ This could be taken to suggest a narrow interpretation of the term; however, the ECJ does not appear to have followed the A-G Opinion in this respect, adopting a more flexible approach:

The term 'establishment' appearing in Article 1(1)(a) of the Directive must therefore be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order for there to be an 'establishment', for the unit in question to be endowed with a management which can independently effect collective redundancies.⁶⁴

Introducing the factor of ‘depending on the circumstances’ introduces flexibility, which suggests that there may well be situations and arrangements of a company that will require consideration of all units of the undertaking together when considering that ‘establishment’ for the purposes of collective redundancies.⁶⁵ This has the consequence of raising the question: in what circumstances, if any, will such an alternative approach be required? A question to which there is no answer to as yet, but one that is, and will continue to be important in the context of any case involving an Option 2 MS and a company that has numerous offices that are situated throughout the MS territory.

In *Athinaiki*, the ECJ developed the definition of the concept further in stating that an ‘establishment’ in the context of an undertaking “may consist of a distinct entity, having a

⁶² Judgment in *Botzen*, Case 186/83, ECLI:EU:C:1985:58, para 15.

⁶³ Judgment in *Rockfon*, ECLI:EU:C:1995:420, para 31 and Advocate General Cosmos’s Opinion in *Rockfon*, ECLI:EU:C:1995:242, para 45.

⁶⁴ See Judgment in *Rockfon*, ECLI:EU:C:1995:420, para 32. Support for this definition can be found in judgment in *Athinaiki*, ECLI:EU:C:2007:101, para 25.

⁶⁵ This broad interpretation is expressed as having the desire to prevent as far as possible companies establishing complex business practices with the aim of limiting the application of the Directive- see judgment in *Athinaiki* ECLI:EU:C:2007:101, para 26.

certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks”⁶⁶; however, that “the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an ‘establishment’”⁶⁷, nor must it have separate powers to effect redundancy⁶⁸, or have a geographical separation from the other units and facilities of the undertaking.⁶⁹ Such decisions being taken separately by an alternative unit will not alone result in that unit not satisfying the definition of ‘establishment’.⁷⁰

Similarly, in *Rockfon*, the decision on the meaning of establishment has to be evaluated taking into account the objective being pursued alongside the socio-economic effects of collective redundancies. It is clear that the ECJ does not want to preclude any particular business setup from being an establishment⁷¹, with determination being wholly fact dependent. As such it must be the case that the definition will change depending on what is required in the circumstances to achieve the underlying objectives of the CRD.

A simple interpretation of the *Rockfon* and *Athinaiki* decisions, which appears to have been accepted by many⁷², is that the ECJ determined that an establishment refers to a local

⁶⁶ Judgment in *Athinaiki*, ECLI:EU:C:2007:101, para 27.

⁶⁷ Judgment in *Athinaiki*, ECLI:EU:C:2007:101, para 28.

⁶⁸ This was already dealt with in *Rockfon*, see judgment in *Rockfon*, ECLI:EU:C:1995:420, para 34, but reiterated here.

⁶⁹ Judgment in *Athinaiki*, ECLI:EU:C:2007:101, para 29.

⁷⁰ Judgment in *Athinaiki*, ECLI:EU:C:2007:101, para 32.

⁷¹ Guidance that can be deduced from case law in the UK suggests that in order to be an establishment there is a need for some degree of permanence, either through a building, some form of administration, centralisation of records, or tools and equipment: see *Barley v Amey Roadstone Corp Ltd* [1977] ICR 546; *Barratt Developments (Bradford) v Union of Construction, Allied Trades and Technicians* [1978] ICR 319, and; *E Green & Sons (Castings) Ltd v Association of Scientific, Technical and Managerial Staffs* [1984] ICR 352. This guidance is clearly no longer valid given the *Rockfon* and *Athinaiki* decisions.

⁷² See for example Craig, “Establishment” and redundancy consultation, (1996), *Employment Law Bulletin*, 9-12; McMullen, Well intentioned decisions from ECJ may backfire in the UK, (1996), *Commercial Lawyer*, 60-61,

site; an undertaking can thus consist of numerous sites, of which each can be viewed as a separate establishment for the purposes of the CRD. This resulted in the *Rockfon* case of each of the four production companies within the group being viewed as individual establishments, and in the *Athinaiki* case of the three separate production units in three different locations that made up the undertaking also be viewed as separate establishments. Applying such an approach to high street names, such as Woolworths and Comet, this would translate to individual stores.

Although these two decisions may be taken, on the face of them, as suggested above, to suggest that establishment needs to be interpreted narrowly and focus upon individual units rather than the establishment as a whole, the converse is arguable, and indeed more attractive from a worker protection point of view. Such a definition must be placed into context and be considered against the backdrop of the intentions of the Court, which was to define “the term ‘establishment’ very broadly, in order to limit as far as possible cases of collective redundancies which are not subject to [the CRD]”.⁷³ The ECJ was not providing a single definition of establishment but appears to be accepting that the definition will differ depending on the circumstances of the case and what is required to achieve the desired protections for the workers affected. Interpreting the term establishment narrowly in Option 1 states has the consequence of requiring evidence of lesser numbers of redundancies in order to invoke the consultation rights due to a link with the size of the establishment itself; however, this differs in Option 2 states where there is no link to the size of the employing institution, and in fact the converse is true, in that a wide definition of establishment will lead to a greater capture of situations which would require consultation. Logically, when an Option 2 state is involved, the ECJ ought to have applied a wider definition that read across

and; Employment Law: collective redundancies- definition of establishment, (2007), *Commercial Law Practitioner*, 108-109.

⁷³ Judgment in *Athinaiki*, ECLI:EU:C:2007:101, para 26.

the collection of units that made up the establishment as a whole. Such an approach is reconcilable with *Rockfon* and *Athinaiki* since the ECJ in those cases provided a caveat to its interpretation of establishment, stating that it “*may consist of a distinct entity [own emphasis added]*”, but ultimately this is “depending on the circumstances”. This dicta suggests that there could be alternative definitions available within the European concept of establishment. The definition could have been considered option specific in order to achieve the underlying principle, with Option 2 States being these different circumstances in which a widened definition of establishment was adopted in order to limit the collective redundancy situations that fell outside of the scope of the CRD.⁷⁴

C. USDAW & Wilson, Lyttle and Cañas: a downward spiral in social rights harmonisation

The suggestion above highlights a teleological interpretation of the concept establishment, based on the relevant CJEU jurisprudence, that would have ensured that the CRD was given widened scope, in accordance with its aim of ensuring that as many collective redundancies as possible would be captured by the CRD. However the CJEU in *USDAW*, *Lyttle* and in *Cañas* opted for a more restrictive approach⁷⁵, and considered that this explicit aim would be outweighed by two other underlying implicit objectives of the CRD: (i) the need to ensure

⁷⁴ Not only will adopting this widened interpretation require expansion of the scope of the UK protections, but it also ensure reparation of any losses suffered by the affected workers through the principle of state liability. Although this is not being discussed in detail in this paper, the relevant case law is alluded to in relation to restricting vertical direct effect of the CRD below. However, for state liability as an alternative option in circumstances such as where an restricted statutory provision has impacted upon the provision of an EU right; see Advocate General Bot’s Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 66; Judgment in *Association de médiation sociale*, C-176/12, ECLI:EU:C:2014:2, para 50, and judgment in *Dominguez*, para 43. The EAT in *USDAW* considers the ECJ case law on establishment in paras. 37-42; although the EAT did reach a similar conclusion, it could have supported its conclusions with a stronger rationale, which would have strengthened the judgment somewhat.

⁷⁵ Although the proper interpretation of establishment was considered in *Cañas*, this was more in relation to how the term differed from the concept of ‘undertaking’.

comparable protection for workers' rights in all MS, and (ii) the need to ensure comparable costs for undertakings in different MS.⁷⁶ However, despite expressing these two objectives there is little supporting evidence that suggests that an option-specific approach to the concept of establishment would distort the levels of worker protection or costs in Option 2 MS when compared to those who adopted Option 1.

Arguably, adopting an option specific concept of establishment, as argued above, which aggregates singular units in Option 2 MSs would actually introduce comparable protections to workers and comparable costs to those present in Option 1 MSs. Such an assertion is supported through a simple consideration of the impact that the two alternative interpretations would have on Option 2 MS when compared to those that elected for Option 1:

- In Option 1 a narrow interpretation of establishment will capture a larger number of redundancies as collective redundancies given the link in the threshold criteria between the number of redundancies and the number employed by the establishment and thus such an interpretation will give maximal coverage to the protections, along with associated costs for affected employers.
- In Option 2, if the same narrow interpretation to the concept of establishment is adopted then this will only capture the minimum number of redundancies as collective redundancies, thus reducing the scope of the protection and any associated costs considerably in comparison to that of Option 1. Maximum exposure to the consultation right under Option 2 would only be achieved through a more inclusive interpretation, and it is only in these circumstances that a comparable level of protection, as desired by the CJEU, would be achieved.

⁷⁶ TIDY UP: See Para 51 and 58 AG Opinion Para 62-63 USDAW CJEU, repeated in Lytle: in support of the existence of these alternative objectives the CJEU cites *Commission v United Kingdom*, C-383/92, EU:C:1994:234, paragraph 16; *Commission v Portugal*, C-55/02, EU:C:2004:605, paragraph 48; and *Confédération générale du travail and Others*, C-385/05, EU:C:2007:37, paragraph 43.

Such argument can be taken even further through using a hypothetical example to highlight the differences between Option 1 and Option 2 approaches, which also contradicts the CJEU's assertion that "[t]he option in Article 1(1)(a)(ii) of Directive 98/59, with the exception of the difference in the periods over which the redundancies are made, is a substantially equivalent alternative to the option in Article 1(1)(a)(i)".⁷⁷ Although it is accepted that the principle aim of the approach is to ensure equivalent alternatives, the CJEU fails to appreciate the extent of the consequence in terms of protection afforded that using different thresholds has. Although the Court has expressly accepted that there is an intention to "maximise the application of the duty to consult ... when applied in the British context this interpretation may considerably reduce the occasions when the 20-employee threshold is crossed"⁷⁸. It is this contradiction that the current CJEU approach has introduced.

Consider a hypothetical company that is made up of two distinct stores and a head office, which is arranged and operates in a manner analogous to the way in which Woolworths and/or Ethel Austin operated. Each store employs 25 workers, with a further 25 employed in head office. If the decision is made to make 15 workers redundant in each store and a further 15 workers redundant from head office, then protection will differ depending on which MS the company is operating in, if the narrow singular establishment approach is adopted across both Option 1 and Option 2:

- In Option 1 Member States all 45 workers will be subject to consultation pursuant to the CRD. As each of the three establishments in which redundancies are taking place, having between 20-100 workers, satisfy the redundancy threshold of 10 redundancies, then a collective redundancy will be deemed to take place.

⁷⁷ Expressed by the CJEU at para 56.

⁷⁸ Deakin and Morris, *Labour Law*, Fifth Edition, 2009 Hart Publishing, at para 9.32.

- In Option 2 MSs if the single employment unit approach to establishment is applied then none of the workers will receive consultation as each of the units have less than the required 20 redundancies, even though 60% of the entire workforce is being made redundant; however, this changes, if a more inclusive approach to establishment is applied such as to aggregate the redundancies across establishments, as suggested above, as this would have the consequence of the 20 redundancy threshold being met. In other words by applying a more inclusive approach in Option 2 MSs then a wholly different outcome is reached, and one that ensures wide consultation rights.

Applying the different approaches available to such a hypothetical example highlights the practical consequences of adopting a singular employment unit approach across the two options. This potentially leads to much less consultation and social protection in Option 2 States when compared to those that adopted Option 1, and thus introduces incomparable levels of protection, which is counter to the suggestion of the CJEU. If one equates the level of protection and extent of consultation rights with costs incurred for carrying out the social right, then this also runs counter to CJEU's justification based on incomparable costs. Ford makes an interesting point with regards the harmonisation of costs rational, expressing that adopting such a justification then the '...envisaged harmonisation is, naturally, downwards not upwards...'⁷⁹ This would contradict the traditional view of a Directive being a floor of rights, which provides a baseline against which upward harmonisation will occur. Taking this further, linking social right to an implicit aim of cost management introduces the potential to further weaken such rights in future considerations. It is difficult to accept that the justifications behind this approach, that of ensuring comparable rights and comparable costs, are met through taking such a rigid approach to the definition of establishment, especially when it is clear that the CJEU has in effect adopted a definition that offers as wide a net of

⁷⁹ Ford, "USDAW v Ethel Austin in the ECJ", OxHRH Blog, 11 May 2015
<http://humanrights.dev3.oneltd.eu/usdaw-v-ethel-austin-in-the-ecj/> Accessed on 25/06/2016.

protection as possible for Option 1 MSs, but as narrow as possible for those that adopted Option 2.⁸⁰ It is difficult to identify comparability in that respect. Ford describes this as a ‘...quiet adjustment of the weight of objectives [which] allowed the ECJ to fall back on the [undefined] “ordinary meaning” of “collective redundancies”’.

Although the Advocate General and the CJEU appear to be expressing the underlying aim of comparability in terms alluding to levels of protection (which is reinforced by the link with costs, when one appreciates the increased costs associate with the increased provision of a social right such as consultation), the clear inference is that there was a desire for legal certainty⁸¹, which would require a term, such as establishment, to be interpreted consistently across the available options, as to do otherwise may hinder this important principle. However, a clear weakness exists in this argument in that this would only be applicable where a distinct and rigid definition had been attached to the concept of establishment by the ECJ in *Rockfon* and *Athinaiki*. Had the ECJ in this line of case law stated that establishment solely refers to a single employment unit⁸² then introducing an alternative definition to a static concept could impact upon the idea of coherency and consistency, and to some extent introduce uncertainty in relation to predicting the correct approach to be adopted. However, as identified above, the CJEU did not attach an explicit and static definition to ‘establishment’, but instead appears to have left the concept open to future development and alternative interpretation where required (presumably in order to achieve its explicit aims, such as that needed under Option 2). Both A-G Wahl and the CJEU appear to have interpreted the previous ECJ decisions as providing a definitive and precise definition of establishment, whereas this does not appear to be the case. Although the intentions of both A-G Wahl and the CJEU - the desire to ensure

⁸⁰ This does not refer to the breadth of the protection under the CRD as a whole but is merely referring to the breadth as constrained by the concept of establishment; there are other restrictive aspects of the CRD that this statement is not referring to and are not being discussed within this paper.

⁸¹ This is a theme that runs throughout Advocate General Wahl’s Opinion, as well as each respective decision of the CJEU.

⁸² This is the clear inference from Advocate General Wahl’s Opinion and each of the CJEU’s decisions.

conformity and consistency - cannot be faulted, the approach adopted has clear implications for the protections afforded in Option 2 Member States, and appears to have reduced the protections afforded during a period when strong protection for worker's was needed. Both A-G Wahl and the CJEU touch upon an important point that could be considered should revision of the Directive ever take place: altering the Option 2 definition of collective redundancy to the wider concept of 'undertaking'⁸³ would remove the problems of consistency and coherency, whilst properly achieving the aim of comparability in this area and enhancing social protection.

V. CONSULTATION RIGHTS, DIRECTLY EFFECTIVE?

Alternative arguments based upon the right to consultation under the Directive being directly effective were also raised before the EAT in *USDAW*⁸⁴; however, the EAT faced two quite significant hurdles in this respect:

- (i) the UK had transposed the Directive through their own national law framework,
- (ii) European Directives lack horizontal direct effect so as to have an impact between two private parties.

To try to circumvent these difficulties submissions were made based firstly, on disapplication of the national law and reliance on consultation rights as contained at Article 27 of the Charter in accordance with the principles developed in *Küçükdeveci* (at least before the EAT), and secondly, on vertical direct effect of the Directive against the Secretary of State.

⁸³ Although this was not explicitly stated, it can be taken from the comments made by both the A-G and the CJEU when the choice of terminology was discussed.

⁸⁴ The issue of direct effect was only raised in the *USDAW* litigation, and was not raised in either the *Lyttle* or the *Cañas* case.

A. Disapplication of national law

Although the EAT in *USDAW* accepted⁸⁵ the submissions of Ms Rose QC that it had the power to dis-apply provisions of national law that were incompatible with European law in these circumstances,⁸⁶ and it initially formed part of the grounds of appeal, neither the Court of Appeal or the CJEU heard submissions on this issue due in large to the decision of the CJEU in *Association de médiation sociale*.⁸⁷ Despite this decision not to pursue the horizontal direct effect of Article 27 of the Charter it is still worth considering this issue as not only may it still be a live issue which could have been questioned further and offered an alternative route to enhanced collective redundancy consultation rights, but it raises wider ranging principles that may have implications for other Charter rights.

It is not the purpose of this paper to question whether the Court/Tribunal is empowered to dis-apply national legislation that offends Union law principles⁸⁸, but to question whether the approach accepted by the EAT was the correct application of these principles, and if not, to question what the correct application of these principles should be in any subsequent case where such argument is raised. The cases of *Kücükdeveci* and *Mangold* are crucial in understanding how this principle works.

Mangold concerned national legislation that authorised, without restriction, the conclusion of fixed-term contracts of employment once the worker had reached the age of 52.

⁸⁵ It appears to be a tentative acceptance of the submission due to the lack of Respondent to argue against it.

⁸⁶ This was based upon the reasoning of the ECJ in *Kücükdeveci*. The EAT indicated that in these circumstances 'reliance on the Charter and on the Treaty gives sufficient access to this interpretative tool'. See *USDAW* (n 1), para 60.

⁸⁷ Judgment in *Association de médiation sociale*, ECLI:EU:C:2014:2. The CJEU judgment was handed down on 15th January 2014, a mere 7 days before the CA hearing in *USDAW*.

⁸⁸ See generally: Schiek, 'The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 ILJ 332; A Eriksson, 'European Court of Justice: Broadening the Scope of European Non-discrimination Law' (2009) I-CON 731; Schmidt, 'The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's *Mangold* judgment' (2005) 7 German LJ 522.

The case reached the ECJ before the transposition period of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter the ‘Framework Directive’) had expired and thus in a technical sense Germany were not yet in breach of their European obligations with respect age discrimination protection. The issue in this case was whether the German government were required to take steps to alleviate the consequences of this national legislation in light of the pending protections that were forthcoming. *Küçükdeveci* concerned national legislation that discriminated on the grounds of age by disregarding employment service accrued before the age of 25 when calculating statutory notice periods. In contrast to *Mangold*, this offending legislation was still in operation post-expiration of the Framework Directive’s transposition period. Similar to the *Mangold* case, the key question referred to the ECJ in *Küçükdeveci* focussed on whether the offending legislative provision needed to be disapplied.

Importantly, when one considers the overall context of the two cases, the ECJ observed that the Framework Directive was not the source from which age discrimination as a principle of equal treatment derived, but that this merely established a general framework for combating discrimination on this ground:

... the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the [first] and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.⁸⁹

A-G Bot further stressed the constitutional importance of the prohibition of age discrimination by emphasising its development, including its inclusion as a criterion of

⁸⁹ Judgment in *Mangold*, C-144/04, ECLI:EU:C:2005:709, para 74; supported by Advocate General Bot’s Opinion in *Küçükdeveci*, ECLI:EU:C:2009:429, para 74, and judgment in *Küçükdeveci*, ECLI:EU:C:2010:21, para 20.

prohibited discrimination in Article 13(1) EC⁹⁰, and more recent developments in the form of a fundamental right under Article 21(1) of the Charter of Fundamental Rights of the European Union.⁹¹

Despite criticisms by A-G Bot of the limited rationale adopted in *Mangold*⁹², the decisions of *Mangold* and *Küçükdeveci* reached a common conclusion that the Framework Directive was merely the manifestation of a protection that already existed on a constitutional level. The principle of non-discrimination on the grounds of age was thus to be regarded as a general principle of EU law.⁹³ A-G Tizzano made it clear that where a Directive is simply the manifestation of a general principle, as was the case in both *Mangold* and *Küçükdeveci*, then the obligations on EU Member States are exactly the same whether the protection is considered under the Directive itself or with reference to the General Principle.⁹⁴ This was developed further to suggest that in these circumstances it makes sense to evaluate the national legislation against the general principle “since, being a general principle of Community law imposing an obligation that is precise and unconditional, it is effective against all parties ...”⁹⁵ and thus does not have the problem of being ineffective between two private parties.⁹⁶ This would enable disapplication of national law and subsequent reliance on the general principle as a source of EU law, both vertically and horizontally.⁹⁷

⁹⁰ This is now contained at Article 19 Treaty on the Functioning of the European Union.

⁹¹ Advocate General Bot’s Opinion in *Küçükdeveci*, ECLI:EU:C:2009:429, para 77.

⁹² See Advocate General Bot’s Opinion in *Küçükdeveci*, ECLI:EU:C:2009:429, para 22.

⁹³ Judgment in *Mangold*, ECLI:EU:C:2005:709, para 75, supported by judgment in *Küçükdeveci*, ECLI:EU:C:2010:21, para 21.

⁹⁴ See Advocate General Tizzano’s Opinion in *Mangold*, C-144/04, ECLI:EU:C:2005:420, para 85; this is further explained in Advocate General Bot’s Opinion in *Küçükdeveci*, ECLI:EU:C:2009:429, para 34.

⁹⁵ Advocate General Tizzano’s Opinion in *Mangold*, ECLI:EU:C:2005:420, para 84.

⁹⁶ Direct effects between two private parties is more commonly known as horizontal direct effect.

⁹⁷ AG Tizzano rejected the idea of a Community Act, such as a Directive itself enabling disapplication of a national provision, this being based on the settled law that such instruments lack horizontal direct effect and that to decide otherwise would be to allow horizontal direct effect of such an instrument in through the back door: Advocate General Tizzano’s Opinion in *Mangold*, ECLI:EU:C:2005:420, paras 106-108; similarly see judgment in *Marshall*, C-152/84, ECLI:EU:C:1986:84, para 48; judgment in *Pfeiffer*, C-397/01, ECLI:EU:C:2004:584, para 109, and; judgment in *Küçükdeveci*, ECLI:EU:C:2010:21, para 46.

A distinction can be drawn between Directives that are based upon a general principle of EU law that have had the transposition period expire, and those where the period has yet to expire. To enable disapplication of national law based on the Directive alone, in situations before the transposition period has expired, would introduce horizontal direct effect through the back door. As a consequence, in such situations, disapplication of national law and subsequent reliance on EU law is only available where there is a recognised EU general principle. Whereas in the former situation, as the general principle and the protections afforded under the Directive are essentially one and the same, and accordingly must have the same legal source, a Directive which is merely the manifestation of a constitutional principle can be used alongside the general principle to dis-apply the offending national law and provide the missing rights, in both vertical and horizontal relationships.⁹⁸ This is supported by A-G Bot:

I would ask the Court to take a more ambitious approach in terms of action to counteract discrimination which is contrary to Community law, an approach which does not in any way involve a head-on confrontation with its classic case-law concerning the lack of horizontal direct effect of directives. That position, which is based largely on the specific nature of the directives intended to counteract discrimination and on the hierarchy of norms in the Community legal order, is that a directive which has been adopted to facilitate the implementation of the general principle of equal treatment and non-discrimination cannot reduce the scope of that principle. The Court should therefore, as it has done in regard to the general principle of Community law itself, accept that a directive intended to counteract discrimination

⁹⁸ Advocate General Bot's Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 72.

may be relied on in proceedings between private parties in order to set aside the application of national rules which are contrary to that directive.⁹⁹

Although it must be said that from a practical point of view this distinction makes very little difference, since such an approach will always be reliant upon finding an underpinning EU constitutional/general principle, or a norm of primary European law from which the protections flowed, otherwise disapplication of national law will not be a possibility.¹⁰⁰

It was on the basis of the constitutional importance of age discrimination protection, and in circumstances where other interpretative tools were unavailable to the national court to achieve the aims of the European legislation, that the ECJ concluded that a national court “hearing a dispute involving the principle of non-discrimination in respect of age, to provide ... the legal protection [derived] from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law”.¹⁰¹ This appears to follow the clearly worded Opinion of A-G Tizzano that the general principle of equality, is sufficiently clear, precise and unconditional for it to be directly effective and thus binding on all legal persons, which includes upon private parties both against the State and against other private parties.¹⁰² As a consequence A-G Tizzano considers that there “is no doubt that in that eventuality the national court would have to dis-apply a national rule held contrary to that principle which is regarded as having direct

⁹⁹ Advocate General Bot’s Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 70.

¹⁰⁰ Advocate General Bot’s Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 6.

¹⁰¹ Advocate General Bot’s Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 77; this is repeated, although with updated terminology, by the ECJ in the judgment in *Kücükdeveci*, ECLI:EU:C:2010:21, para 51.

¹⁰² This is supported in Advocate General Bot’s Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 85: ‘...the fact that the main proceedings were between private parties could not preclude the general principle of Community law in question from being relied on to exclude national legislation, since the Court has already on several occasions taken a more significant step by recognising that provisions of the Treaty containing specific expressions of the general principle of equal treatment and non-discrimination have horizontal direct effect.’

effect”.¹⁰³ In a similar vein the ECJ concluded that national courts, in order to comply with their obligation of ensuring full effectiveness of this constitutional principle, may be required to dis-apply offending national laws.¹⁰⁴

Taking both the *Mangold* and the *Kücükdeveci* decisions together it leaves us with the conclusion that national law can only potentially be disapplied and substituted for European rights, such as those contained within a Directive¹⁰⁵ or the Charter¹⁰⁶, is if the right being pursued is based upon a general principle of EU law, and where no other interpretative tools are available to achieve this same end result. It is therefore crucial in such circumstances to first identify an underlying general principle of EU law, as otherwise this route appears closed off. The presence of a legal document alone as a source of a European right does not appear sufficient to enable dis-application of national law.

There was a potential opportunity for the CJEU to address this approach in *Association de médiation sociale*, where it was faced with a similar issue as that in *USDW*¹⁰⁷, namely whether Article 27 of the Charter, expressing the principle of information and consultation for workers, which was specified in the provisions of Directive 2002/14, could be invoked in a dispute between private parties.¹⁰⁸ The question being asked, as summarised by the CJEU, was whether:

¹⁰³ See Advocate General Tizzano’s Opinion in *Mangold*, ECLI:EU:C:2005:420, para 101, similar conclusions are reached in Advocate General Bot’s Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 81.

¹⁰⁴ Judgment in *Mangold*, ECLI:EU:C:2005:709, para 77; a similar position is adopted in *Kücükdeveci*, citing in support the judgment in *Pfeiffer*, C-397/01, ECLI:EU:C:2004:584, para 111, and the judgment in *Impact*, Case C-268/06, ECLI:EU:C:2008:223, para 42. Further see the discussion in Craig and De Burca, *EU Law: Text, Cases and Materials (Fifth Ed.)*, 2011, OUP, 894-895.

¹⁰⁵ Such as the CRD.

¹⁰⁶ In this context it would be Article 27 of the Charter, which deals with information and consultation rights of workers.

¹⁰⁷ The issue was not identical as in *USDW* the matter concerned the protection of consultation rights under the CRD, whereas the consultation rights in *Association de médiation sociale* were those that are found in Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

¹⁰⁸ This could have been the opportunity that the CJEU needed to address that which was raised in Advocate General Bot’s Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 90: ‘...the Court will, in my view, be inevitably

Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter can be invoked in a dispute between individuals in order to disapply that national provision.¹⁰⁹

In considering this matter the CJEU reached the conclusion that the principle of information and consultation contained within Article 27 of the Charter and the CRD differed from the considerations in *Küçükdeveci*, since in that case the matter concerned the principle of non-discrimination on the grounds of age, which was sufficient in itself to confer rights between individuals¹¹⁰, whereas the Charter envisaged that the rights would be given more ‘specific expression’ in EU or national law before becoming fully effective¹¹¹; it is not disputed that such a requirement would lead to the conclusion that the Charter right itself was not sufficiently clear to enable it to be directly effective. However, it is questionable whether the situation in *Küçükdeveci* was wholly different from that in *Association de médiation sociale* in reality. Arguably, a general principle, such as age discrimination, that was manifested through further EU action, such as a Directive, which itself required more ‘specific expression’ in national law, is not too dissimilar to that which was considered in *Association de médiation sociale*.

confronted with other situations which raise the question of the right to rely, in proceedings between private persons, on directives which contribute to ensuring observance of fundamental rights. Those situations will probably increase in number if the Charter of Fundamental Rights of the European Union becomes legally binding in the future, since among the fundamental rights contained in that charter are a number which are already part of the existing body of Community law in the form of directives. In that perspective, the Court must, in my view, think now about whether the designation of rights guaranteed by directives as fundamental rights does or does not strengthen the right to rely on them in proceedings between private parties’.

¹⁰⁹ See judgment in *Association de médiation sociale*, ECLI:EU:C:2014:2, para 23. This is further simplified in Advocate General Cruz’s Opinion Villalon in *Association de médiation sociale* C-176/12, ECLI:EU:C:2013:491, para 1: ‘...whether the Charter of Fundamental Rights of the European Union (‘the Charter’), where its contents have been given specific expression by a directive, may be relied on in relations between individuals’.

¹¹⁰ Judgment in *Association de médiation sociale*, ECLI:EU:C:2014:2, para 47.

¹¹¹ Judgment in *Association de médiation sociale*, ECLI:EU:C:2014:2, para 45.

The focus of the CJEU in *Association de médiation sociale* was on the Charter right itself, without consideration of any underlying constitutional principle; accordingly this case did not question the matter that is at the heart of the *Mangold* and *Kücükdeveci* cases: is there an underlying general principle of which the Charter is simply the manifestation of? Such a question was clearly still open to USDAW to refer to the CJEU, even following *Association de médiation sociale*. This may have been a question worth raising since if the consultation right was established as a general principle of EU law then TULCRA could then have been dis-applied if it was found to be too restrictive, with the general principle and the Charter right and/or the CRD, as a manifestation of those protections, then being afforded horizontal direct effect between the parties.¹¹² This can be considered a missed opportunity, given that this may have provided some indication as to how the CJEU would deal with submissions relating to the Charter being a manifestation of EU constitutional/general principles¹¹³, which has potential to greatly impact the landscape of EU rights.¹¹⁴

B. Vertical Direct Effect

¹¹² This could have provided a useful alternative route of widening the scope of the protections if it was later to be found that the specific wording of s.188 TULCRA could not be interpreted in a manner consistent with the requirements of the CRD. Although it must be said that the likelihood of consultation rights being found to be an EU general principle is likely to be slim.

¹¹³ There is not much in the academic domain that gives consideration to the rights contained within the Charter as reflecting a corresponding general principle of EU Law, with much available work focussing on the Charter itself being a sources of rights; however, the potential for such an approach has been recently touched upon in H Hofmann and B Mihaescu, 'The relation between the Charter's fundamental rights and the unwritten general principles of EU law: good administration as the test case' (2013) *European Constitutional Law Review*, 73-101; however, it must be said that a better 'test case' would have been to select a more substantive right, such as consultation of workers.

¹¹⁴ The matter of relying on Charter rights in proceedings between private parties will have to be addressed in the near future, as identified in Advocate General Bot's Opinion in *Kücükdeveci*, ECLI:EU:C:2009:429, para 90. This will ultimately require an assessment as to which of the Charter rights are founded upon underlying general principles and as such can be afforded horizontal direct effect, so long as the underlying general principle satisfies the direct effect test. Although the information and consultation rights contained within Article 27 are unlikely to be viewed as a general principle, especially in the absence of an opinion of the CJEU on this matter, this would have given the CJEU an opportunity to consider it.

A second fall back argument that was raised before the EAT in the *USDAW* case¹¹⁵ was based on vertical direct effect against the state, which also formed part of the questions referred to the CJEU. However, the CJEU declined to answer this question, on the basis that the UK's approach was found to be compatible with Directive 98/59, and thus this question became redundant.¹¹⁶ However, this paper turns to consider this submission, primarily on the basis that the CJEU could be considered to have reached this conclusion based on a potential misapplication of its previous jurisprudence, as discussed above, and as such consideration of this matter is very much worthwhile. Furthermore, there may be other Member States that have transposed the CRD incorrectly, against which similar submissions may be made. The argument, as raised, was based on the fact that the Secretary of State was joined as a party in *USDAW*, and that from that point onwards it had responsibility for ensuring payment of the protective awards to all of the affected employees. This submission is predicated on section 188 and 189 of the Employment Rights Act 1996, under which a protective award made against an insolvent employer is treated as a preferential debt, which is recoverable against the Secretary of State. Although this submission, as with the others, was accepted by the EAT, it is stated to have had "less confidence in that argument"¹¹⁷, and it is easy to appreciate why.

There were evidently two rights at play in *USDAW*:

- (i) the substantive right of consultation itself; and
- (ii) the enforcement mechanism.

These two rights are inseparably intertwined in that the enforcement mechanism is reliant on a breach of the substantive right to become operable; however, this does not mean

¹¹⁵ This submission is particular to the *USDAW* case alone, and does not appear in the *Lyttle* reference.

¹¹⁶ *USDAW* case, Para. 72. [TIDY UP]

¹¹⁷ See EAT judgment, paragraph 62.

that by virtue of the consultation right being capable of being directly effective against the state that the enforcement mechanism would likewise be directly effective, or vice-versa. Direct effect requires each aspect to be considered individually.

In order for a provision to be directly effective it has to be sufficiently clear, precise and unconditional so as to be capable of being applied directly in a national court.¹¹⁸ The purpose of direct effect is thus to identify justiciable rights which can be properly protected within national courts; it is purely a matter of enforcement of rights. The consultation right as found in the CRD appears to satisfy this test and would therefore be capable of vertical direct effect. In contrast the enforcement mechanism, on the face of it, appears to lack the requisite clarity or precision for direct effect, with Article 6 CRD providing:

Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers.

Although this provision will not affect any direct effect of the substantive right¹¹⁹ it does raise an interesting question, which could have been crucial to the *USDAW* case: can rights be held directly effective against the state or an emanation of the state if said rights came into operation before the state had any responsibility or involvement with that particular right, and/or where enforcement of the substantive right was no longer possible?

There is no doubt that the UK's Secretary of State will be deemed to be an emanation of the state¹²⁰, and that the consultation right would have been directly effective against it in simple vertical cases, such as if the Secretary of State decided to downsize due to a cut in its budget, leading to redundancies in its workforce; however, it only makes sense to hold a right

¹¹⁸ See Judgment in *Arcor AG & Co KG*, C-152/07 to 154/07, ECLI:EU:C:2008:426, paras 39-44, and judgment in *AGIM*, C-471/07 and 472/07, ECLI:EU:C:2007:748, paras 25-29.

¹¹⁹ Judgment in *Cobelfret*, C-138/07, ECLI:EU:C:2009:82, para 61.

¹²⁰ Judgment in *Foster v British Gas*, C-188/89, ECLI:EU:C:1990:313.

directly effective against the emanation of the state if it had responsibility for providing and ensuring compliance with a particular substantive right. It appears to be stretching direct effect too far to hold substantive rights directly effective against an emanation of the state, as submitted on behalf of USDAW, where the state only becomes involved following failure of the right and the subsequent invoking of enforcement provisions; the consequence of deciding otherwise is that the Secretary of State would always be held responsible for a failure to consult under the CRD where a company goes into liquidation and fails to meet its obligation, which would dis-incentivise failing companies to comply with the consultation requirement since the responsibilities and liabilities would always pass to the State.¹²¹

There exists a disconnect between the role of the Secretary of State and the substantive consultation right, since the right only existed at a point in time before the involvement of the Secretary of State. This must be the logical conclusion given that on liquidation, the right to consult with that company is frustrated, and thus no longer capable of being achieved. As such it would appear odd if the mechanism of direct effect, which is designed to protect and provide individuals with rights which are enforceable in their national courts, should survive and attach to the State which became involved in proceedings at a point in time when the original right no longer existed.

A further implication of finding that vertical direct effect existed in this situation would be to extend it in a way that would encroach upon the area of State liability, given that this provides a means of holding a state liable where it incorrectly implements a Directive. A failure to properly implement the substantive consultation right, which causes damage to an individual, is reparable under the principle of State liability so long as it can be established

¹²¹ Although the CJEU made no comment on this matter, Advocate General Wahl reached a similar conclusion when considering the question of vertical direct effect: see para 80 [TIDY UP]

that the breach is sufficiently serious to impose State liability.¹²² To develop vertical direct effect in the manner submitted would have the consequence of the state being held liable for the losses caused to individuals through a failure to consult without the need to establish that the failings of the state with regards implementation of the right was sufficiently serious. There appeared to be some confusion in the approach adopted by USDAW in this respect, which has led to Marson and Ferris describing both the EAT and CA's approach as a worrying misunderstanding of the principle of direct effect, and that it is a failure '...to recognise the nature of the enforcement mechanism [and] the distinction between the duty and the obligation...'¹²³ Consequently, any such alternative argument based upon vertical direct effect, even had it been given full consideration by the CJEU, was bound to fail.

VI. CONCLUSIONS

The concept of 'establishment' is a key one in the operation of the CRD, and in particular is central in determining whether the redundancy threshold that is set out at Article 1 of the CRD has been satisfied. Although the CRD provides MSs with options as to how to achieve its aims, this concept appears across the two options: the mischief caused by this, given that each respective option imposes other qualifications to be satisfied to attract information and

¹²² On state liability generally see judgment in *Frankovich*, Case C-6 and 9/90, ECLI:EU:C:1991:428; judgment in *Brasserie du Pecheur*, C-46/93 and C-48/93, ECLI:EU:C:1996:79, and; judgment in *Factortame*, cases 49/93 and 48/93, ECLI:EU:C:1996:79. On the matter of determining whether a failing in implementation is sufficiently serious to impose state liability a number of factors to be considered were developed in the *Brasserie* and *Factortame* case: see judgment in *Factortame*, ECLI:EU:C:1996:79, para 56. For examples of the principle operating in practice see judgment in *Hedley Lomas (Ireland) Ltd*, case C-5/94, ECLI:EU:C:1996:205, judgment in *British Telecommunications plc*, C-392/93, ECLI:EU:C:1996:131; judgment in *Dillenkofer*, C-178/94, C-179/94, C-188/94, C-189/94, C-190/94, ECLI:EU:C:1996:375, and; judgment in *Kobler*, C-224/01, ECLI:EU:C:2003:513. For academic commentary on the principle of state liability see: Craig, 'Frankovich, Remedies and the Scope of Damages Liability' (1993) 109 LQR 595; Davis, 'Liability in Damages for a Breach of Community Law: Some reflection on the Question of Who to Sue and the Concept of "the State"' (2006) 31 ELRev 69; Beutler, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' (2009) 46 CMLRev 773.

¹²³ Marson and Ferris, 'The Transposition and Efficacy of EU Rights. Indirect Effect and a Coming of Age of State Liability?' (2015) *Business Law Review*, 158.

consultation rights, is that a narrow interpretation of establishment under Option 1 increases the scope of the information and consultation entitlement, but would have the consequence of a decreased scope of entitlement under Option 2, and vice-versa.

In guiding their decisions in each of the referred cases, namely *USDAW*, *Lyttle* and in *Cañas*, the CJEU considered and applied the previous case law that interpreted this term, that of *Rockfon* and *Athinaiki*. Although one can appreciate the logic of the CJEU, which is clearly predicated on the need for consistency and coherency of the term, the decisions need to be considered in context: the ECJ when interpreting the term ‘establishment’ in *Rockfon* and *Athinaiki* were seeking to “...limit as far as possible cases of collective redundancies which are not subject to [the CRD]”. This had the consequence, given that these cases involved MSs that opted for Option 1 transposition and thus a link between number of redundancies and size of the establishment making them, of a narrow interpretation being adopted in order to achieve this crucial aim. Had the same aim been the focus in *USDAW* or *Lyttle*, without the complication of previous decisions, then arguably a wider interpretation would have been forthcoming.

The CJEU appears to consider itself bound by the decisions of *Rockfon* and *Athinaiki*, detailing that these decisions have interpreted establishment to mean a single employment unit; however, a closer examination of these two decisions reveal that the ECJ did not lay down such a specific interpretation, but introduced an element of flexibility, which would have allowed an alternative interpretation to be attached where the circumstances required it. Extending the scope of the CRD through an alternative interpretation of establishment in Option 2 MSs so as to ‘...limit as far as possible cases of collective redundancies which are not subject to [the CRD]’ may have been such requiring circumstances. However, the CJEU opted against such an approach in favour of a static interpretation, citing weak rationales concerning comparability of protection and reduction of costs. The inevitable consequence of

such an approach is to weaken the information and consultation rights of workers in MSs that have adopted an Option 2 transposition of the CRD, with the specific facts surrounding the closure of Woolworths and Bon Marche stores providing evidence of such.

The result of these decisions is that, at present, the UK legislative provision fails to provide all affected workers with appropriate consultation rights when there are collective redundancies being planned at an undertaking, due to introducing a requirement that the number of redundancies be calculated at singular establishments rather than across the enterprise as a whole.

The further submission that was referred to the CJEU in *USDW*, which is not present in the *Lytle* or *Cañas* case, that of vertical direct effect of the consultation right due to the Secretary of State being made a party to proceedings, never appeared likely to succeed, and is unlikely to have good prospects of success in any future references should any be forthcoming. If direct effect is taken through from its development, it is clear that its purpose is to ensure that a right that has fully crystallised and is self-standing can be enforced. It is the lack of available consultation as a CRD right being in existence at the point of time when the Secretary of State has a role to play in the context of the insolvency that ought to preclude such a finding. Furthermore, the enforcement mechanism itself simply does not satisfy the well-established test for direct effect. To that end, arguably this point is moribund.

Yet, a more important and interesting legal point, which was dropped before the CA in *USDW*, was the submission requiring disapplication of the national law and subsequent horizontal direct effect of the consultation right. This could have provided the CJEU an opportunity to consider the Charter from a different angle than that offered in *Association de médiation sociale* if presented appropriately; not whether the Charter itself could be afforded horizontal direct effect, but whether the consultation right contained within the Charter at

Article 27 and that found within the CRD were simply manifestations of a general principle of EU law, which could thus require disapplication of national law, with the general principle, guided by Article 27 and the CRD (similar to the approach adopted in *Küçükdeveci*) then being afforded horizontal direct effect. It appears to be an opportunity missed in that respect. This approach may be one for the future, and can certainly be considered an option with respect other rights contained within the charter; the success of such will ultimately be dependent on convincing the court that a parallel underpinning general principle also exists.

The three decisions of the CJEU may be viewed negatively, at least in terms of worker protection as the consequence has been to narrow the scope of the consultation rights in Option 2 MSs. A more preferable outcome would have been to place greater focus on the central aim of the CRD, worker protection. Equally important is that this approach would have been easily reconcilable with *Rockfon* and *Athinaiki*, and so would not have required these decisions to be departed from, but merely built upon. There are practical impacts that would need to have been addressed had the CJEU ruled in this manner: in particular, whether large businesses that make use of separate groups would have had to ensure that communication lines were sufficient when dealing with redundancies in any aspect of their business, since such redundancies across the business as a whole would have had to be accumulated when addressing whether a collective redundancy situation had arisen and to whom they should consult. Plainly, what the CJEU ought to have done was reiterate the Preamble of the Directive: ‘...that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the [EU]...’ To that end, consult is key and to whom that consultation must be with remains the crucial question; a question that was thrust into the spotlight due to the UK’s pick and mix approach to the CRD of requiring consideration of the

term establishment in connection to an Option 2 transposition, and one which the current answer does not appear to achieve. Interpreting this term appropriately is crucial, and may become an ever-increasingly crucial matter following the vote for Brexit in the UK, and the potential consequences that may follow in terms of the predicted job-losses.